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No. 91-1384

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

v.

CHARLES D. BATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held in a diversity case that Oregon law permits a prior vacated judgment to be given collateral estoppel effect.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

1. Respondents in this diversity case are 25 Union Oil of California (Unocal) dealers, who owned or operated gas stations in Oregon. Respondents were damaged when Unocal switched their supply of unleaded regular gasoline from 89 octane to 87 octane, and substituted unleaded premium gasoline for leaded premium gasoline, without informing them or the public of these changes. Respondents alleged that these actions constituted fraud, breach of contract, and tortious breach of the duty of good faith and fair dealing, and sought economic, general and punitive damages.[1]

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[1] Unocal incorrectly states that total of the *Bates* judgment was $8 million; it was approximately $3.6 million. ER 303-374.

Essentially the same claims had been brought by 45 Unocal dealers in a prior case. *Amos* v. *Union Oil Co. of Cal.*, 663 F. Supp. 1027 (D. Or. 1987). Following a 12-day trial, the jury in *Amos* awarded the Unocal dealers economic, general and punitive damages.

After Unocal appealed, settlement discussions ensued before Judge Edward Leavy of the United States Court of Appeals for the Ninth Circuit. Unocal recognized that, if it settled the *Amos* case, it ran the risk of subsequent plaintiffs asserting collateral estoppel. ER 108.[2] Nevertheless, a tentative settlement was reached, conditioned upon the district court vacating the *Amos* judgment. The terms of this settlement are not contained in the record.

Following the tentative settlement, Unocal filed a motion and brief in the district court seeking assurances that the *Amos* judgment would be vacated if the case settled. ER 116, 119 *et seq.* In Unocal's brief, it reiterated its concern about the use of offensive collateral estoppel if the *Amos* case settled. Unocal did not, however, ask the Court to undertake any inquiry into whether the judgment should be denied preclusive effect in subsequent suits as required by *Ringsby Truck Lines* v. *Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982).[3] Instead, it simply requested the court to grant the motion under Fed.R.Civ.P. 60(b). The district court order indicating that it would grant vacatur simply stated that the motion would be granted pursuant to Rule 60(b) and did not address the *Ringsby* factors or the future preclusive effect of the vacated judgment. ER 114.

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[2] "ER" refers to appellant's Excerpts of Record in the Court of Appeals.

[3] Since 1982, the rule in the Ninth Circuit has been that when a case is settled pending appeal from a judgment in favor of a plaintiff, a decision to grant vacatur may be made by the district court only after balancing "the competing values of finality of judgment and right to relitigation of unreviewed disputes . . . ." *Ringsby Truck Lines* v. *Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982).

Unocal then asked the Ninth Circuit to remand the case to the district court. ER 111. Unocal acknowledged in its motion that vacatur might not preclude the judgment from being given collateral estoppel effect in a subsequent lawsuit. ER 113. On February 29, 1988, the district court vacated the *Amos* judgment. ER 122. The *Ringsby* balancing analysis was never performed.

2. Against this backdrop, the *Bates* plaintiffs (respondents herein) filed an action against Unocal in the United States District Court for the District of Oregon, raising identical claims to those litigated by the *Amos* plaintiffs. The case was assigned to the same judge who had presided over the *Amos* trial, Chief Judge Panner.

Plaintiffs moved for partial summary judgment, seeking collateral estoppel against Unocal based on the *Amos* verdict. The district court granted the motion.[4] The court explained that its decision to vacate the *Amos* judgment did not prevent use of collateral estoppel here:

> "My order of vacatur says nothing about the preclusive effect of the *Amos* judgment, nor does it indicate my opinion on it. I vacated the *Amos* judgment so that the parties would settle the case." Pet. App. 18a-19a.

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[4] While the *Bates* case was proceeding to trial and appeal, a third case challenging Unocal's conduct in dealing with its Northwest dealers was filed in the United States District Court for the Western District of Washington, *Houser* v. *Union Oil Co. of Cal.*, No. C88-1233-R (W.D. Wash. Oct. 20, 1989). The *Houser* plaintiffs also sought collateral estoppel based on the *Amos* judgment. On October 20, 1989, the Western District of Washington, the Honorable Barbara J. Rothstein, reached the same conclusion that the district court had reached in *Bates*: Despite the *Amos* settlement, collateral estoppel should be applied against Unocal. *Houser, supra*, ER 226 *et seq.*. Unocal also appealed that case; the Ninth Circuit resolved that case on the same grounds as *Bates*.

Unocal has also filed a Petition for Writ of Certiorari in that case, *Union Oil Company of California* v. *Hamilton, et al.* Unocal raises the identical arguments in that case as it is raising in this case.

Stating that he had not previously balanced the competing interests in deciding whether to vacate a judgment for purposes of possible relitigation, the court did so and concluded that collateral estoppel was appropriate: [5]

> "The interest in settlement is one that every trial judge confronts daily. I do not dismiss it lightly, but consider it as a factor to balance against an equally strong interest in finality.
>
> "Settlement and finality are not countervailing considerations. At their core is the common concern for preventing needless litigation and the waste of the court's, the litigants', the jurors', and the public's resources. In this case, this concern is served by preventing rather than allowing re-litigation. . . ."

3. Unocal filed appeals in both *Bates* and *Houser*. The Ninth Circuit ruled that federal law controlled when a judgment should be vacated pursuant to Fed.R.Civ.P. 60(b), but that in a subsequent diversity action, "the *forum state's law* applies to determine the preclusive effect of a previous judgment." *Bates*, *supra*, Pet. App. 5a (emphasis added). Since Oregon has not resolved its law on this point, the Ninth Circuit "assumed" that Oregon would apply federal law. *Id.*

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[5] The court separately ordered that certain damages awarded in *Amos* should have collateral estoppel effect in *Bates*. *Bates v. Union Oil Co. of Cal.* Op. of 3/31/89; ER 215, *et seq.*:

> "I cannot overemphasize the fundamental principles for which *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 320 (1979) stands—fairness, judicial discretion to manage caseloads, and conservation of society's resources. . . .
>
> "Federal trial judges have a duty to develop the fairest, most efficient, and innovative procedural tools for handling a heavy and growing caseload. This is not a self-serving goal. It serves society at large, litigants, and juries. That is the guts of *Parklane*, and the purpose of offensive collateral estoppel.
>
> ". . . There is no efficiency or fairness in retrying Unocal's conduct. One jury spent twelve days and found that Unocal committed a serious fraud. To relitigate *Amos* would be wasteful." ER 224-225.

Noting that the problem in the instant case arose because the record failed "to disclose that the [trial] court considered the *Ringsby* factors at the time of vacatur," the Ninth Circuit held that Chief Judge Panner was empowered to confront the question of the preclusive effect of the vacated *Amos* judgment when the issue was raised in *Bates*.[6] Although Unocal argued that it was not responsible for the district court's failure to perform the *Ringsby* balancing, the Ninth Circuit disagreed. The court held that Unocal had taken a "calculated risk" in seeking vacatur without asking the trial court to balance the *Ringsby* factors. Pet. App. 10a. Unocal subsequently filed a petition for rehearing and a suggestion for rehearing *en banc*, both of which were denied.

REASONS FOR DENYING THE PETITION

1. Petitioner Unocal claims that this case presents two issues: (a) Whether under Fed. R. Civ. P. 60(b) parties settling a case on appeal may require the district court judgment to be vacated; and, (b) Whether a vacated judgment may be accorded collateral estoppel effect. Unocal argues that the Ninth Circuit has analyzed these issues differently than other circuits, and that this case is therefore worthy of review.

Unocal's analysis is totally misplaced. The Rule 60(b) issue is clearly not before this Court for the simple reason that *petitioner moved* to have the judgment vacated and it was vacated. The fact that the judgment might

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[6] The court of appeals stated:

> "[T]he rule we adopt today encourages the party seeking vacatur to call to the district court's attention the requisite *Ringsby* factors at the time vacatur is sought. The District Court can then perform the balancing task according to *Ringsby* and decide whether to vacate the judgment. If the court does not consider *Ringsby* in granting or denying the motion to vacate, the question of issue preclusion from the first trial will remain open for subsequent determination in a later case." *Bates, supra*, Pet. App. 8a-9a.

not have been vacated in some other court hardly provides any basis for petitioner to obtain review of the decision in its favor. Simply stated, petitioner has nothing more than an academic interest in the "conflict in the circuits" it identifies concerning the proper way to interpret Rule 60.

Petitioner attempts to avoid this problem by linking the Rule 60(b) issue of vacatur with the completely distinct question of the collateral effects of the vacated judgment. While the decisions analyzing the Rule 60(b) issue are animated by the issue of preclusive effect, the questions remain separate. This is best demonstrated by the fact that the issue of vacatur is a question of federal law and the issue of preclusive effect is a matter of state law.[7] Properly analyzed therefore, the first issue is simply whether Rule 60(b) relief was appropriate in this case, a matter—once properly severed from collateral estoppel—of no practical importance to petitioner.

Petitioner's second issue concerning collateral estoppel is clearly unworthy of review by this Court because the question whether a vacated judgment nevertheless can be accorded collateral estoppel effect in a diversity action is purely a question of state law. Indeed, Unocal argued at the court of appeals that Oregon law governed this issue. Opening Brief for Appellant at 32-34, *Bates* v. *Unocal*, *supra*.[8] For more than a decade it has been clear that

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[7] What makes the petitioner's complaint about the issue particularly hollow is that petitioner was completely aware of the problem at the time it entered into the *Amos* settlement. It is simply not possible for any federal court in a diversity action to guarantee that a vacated judgment will not be given preclusive effect by a subsequent state court (or federal court sitting in diversity). Thus, Petitioner took a "calculated risk" in settling the *Amos* cases while on appeal. Petitioner received the full benefit of its bargain with those plaintiffs and it received all of the relief to which it was entitled from the district court.

[8] Petitioner has not sought review of the Ninth Circuit's holding that the preclusive effect of a previous judgment in a diversity

this Court has no "interest in reviewing diversity cases where the only issue is the consistency of the court of appeals decision with applicable state substantive law," which, properly analyzed, is precisely what is at issue here. R. Stern, et al., *Supreme Court Practice* 212 (6th ed. 1986).

The actual holding of the Ninth Circuit in this case is that Oregon law would preclude relitigation by petitioner of the issues finally decided in *Amos*. To be sure, there are statements in the court's opinion regarding the court's view of the proper federal rule of estoppel, but those statements in this diversity action are merely *dicta* and it is well settled that this Court reviews judgments not opinions. See, *e.g.*, *Chevron U.S.A., Inc.* v. *National Resources Defense*, 467 U.S. 837, 842 (1984); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297-98 (1956).

2. Even if the issues identified by petitioner were in fact before the court, those issues would not warrant review. The importance of the Rule 60(b) issue is exaggerated by petitioner and seems to be clearly a matter that may never need a uniform answer and certainly does not require one from this Court now. The decision of the Ninth Circuit in this case is just a technical response to a unique problem created by Unocal's actions that almost certainly will never recur. The Ninth Circuit, in *Ringsby*, *supra*, 686 F.2d at 722, stated that a district court may grant vacatur, but only after balancing "the competing values of finality of judgment and right to relitigation of unreviewed disputes." When it sought vacatur, Unocal failed to request the district court to perform the balancing test *Ringsby* requires. Unocal took "a calculated risk" both that judges in future cases would look no further than the act of vacatur itself and

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action is governed by "the forum state's law." *Bates*, *supra*, 944 F.2d at 649; Pet. 5a. To the contrary, petitioner misleadingly asserts that "the court first concluded that the preclusive effect of the *Amos* judgment is governed by federal law." Pet. 6.

that State law would permit relitigation and thereby deny preclusive effect to the *Amos* judgment. Pet. App. 10a. Unfortunately for Unocal, the very same trial judge heard the subsequent case. Chief Judge Panner knew that he had never been asked to bar the preclusive effect of the *Amos* judgment. He also concluded that collateral estoppel was appropriate *under Oregon law*, and proceeded to apply it. Pet. App. 20a.

When Unocal appealed, the Ninth Circuit was presented with a narrow issue: who should bear the burden when Ninth Circuit procedures for granting vacatur are not followed? The Ninth Circuit placed the burden on the party seeking vacatur, requiring it "to call to the district court's attention the requisite *Ringsby* factors at the time vacatur is sought." Pet. App. 8a. Unocal's challenge to the Ninth Circuit's resolution of this procedural issue is simply not worthy of this Court's review.

The Ninth Circuit concluded that the procedure it required to vacate a judgment and to ensure that the judgment is not given preclusive effect had not been followed. It further held that Unocal, as the party seeking the benefits of vacatur, was responsible for ensuring that the Ninth Circuit's procedural requirements were followed. Unocal's unwillingness to accept responsibility for its own desire to have it both ways causes it to suggest in this Court that it was "tricked," "bamboozled," and subjected to "judicial ambush" by Chief Judge Panner. Pet. 21, 25, 26. Even if Unocal's view is accepted, this surely makes this case unlikely to recur, and therefore not appropriate for review by this Court.

In fact, however, the district court's view plainly was that judicial economy favored the application of offensive collateral estoppel to avoid permitting Unocal, at great public expense , to retry the exact same case it had tried in *Amos*. Those conclusions, rather than trickery, were the court's motive. The Ninth Circuit deemed the ruling appropriate as a matter of circuit procedure and state

law. That decision is not of broad general application and does not merit this Court's review.

The unique facts presented in this case are unlikely to recur. Settling parties in the Ninth Circuit seeking to avoid collateral estoppel have been clearly told that, at a minimum, it is their responsibility to make a record that vacatur was obtained through the proper procedure. Counsel in the Ninth Circuit have now been told that they cannot win the gamble of creating an inadequate record when securing vacatur in order to cry foul in a later case.

3. Even if the Rule 60(b) issue were properly in this case the issue of vacatur is not a matter of general importance. There are only a few reported decisions on the issue in a ten year period. Six circuits have issued opinions examining the issue.[9] Of the remaining seven circuits, Unocal identifies three[10] that have issued orders requiring vacatur in individual cases. Those orders do not indicate that the issue of vacatur was afforded any detailed analysis, or that these circuits plan to vacate all similar cases. Indeed, a district court in the Tenth Circuit recently declined to vacate a case after settlement pending appeal. *Russell* v. *Turnbaugh*, 774 F. Supp. 597 (D. Colo. 1991).

Unocal suggests that conflicts between the circuits will impede settlements involving "national concerns." Pet. 24. So far as plaintiffs can determine, the issue of

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[9] The District of Columbia, Second, Third, Seventh, Ninth, and Federal Circuits. *In re U.S.*, 927 F.2d 626 (D.C. Cir. 1991); *Nestle Co.* v. *Chester's Market, Inc.*, 756 F.2d 280 (2d Cir. 1985); *Clarendon, Ltd.* v. *Nu-West Indus., Inc.*, 936 F.2d 127 (3d Cir. 1991); *In re Memorial Hosp., Inc.*, 862 F.2d 1299 (7th Cir. 1988); *Ringsby Truck Lines* v. *Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982); *Federal Data Corp.* v. *SMS Data Prods. Group*, 819 F.2d 277 (Fed. Cir. 1987).

[10] The Fourth, Tenth, and Eleventh Circuits. *Kennedy* v. *Block*, 784 F.2d 1220 (4th Cir. 1986); *First Nat'l Bank* v. *Don Adams Mining Co.*, 844 F.2d 1445 (10th Cir. 1986); *Mur-Maid Enters., Inc.* v. *Townsend*, 951 F.2d 297 (11th Cir. 1992).

whether vacatur obtained in one circuit should be honored by a different circuit with different vacatur rules has *never* arisen. Nor is it presented here.

Moreover, the question of whether Rule 60(b) relief must always be available or not when there is a settlement after judgment does not require a uniform national rule. No primary activity is affected by having different rules in different circuits on this purely procedural issue. All that is important is what the rule is within each circuit. The choice of which rule to follow depends on each court's experience in resolving disputes with multiple claims. A rule allowing vacatur may promote settlements but will allow relitigation; a rule denying vacatur may impede some settlements but may prevent large numbers of other claims from being relitigated.

It is far from clear empirically which is the more efficient system and thus the federal courts likely will benefit from allowing different circuits to follow different courses to permit some form of empirical analysis of the consequences of following different approaches.[11] If this Court were to intervene now and arbitrarily choose one

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[11] Unocal suggests that the *Ringsby* approach impedes settlement of cases on appeal. Pet. 8-10. However, circuit statistical reports do not support this assertion. The settlement rate of the Ninth Circuit, which Unocal claims offers the worst of all possible worlds, appears to be well above average. The Administrative Office of the United States Courts does not keep statistics on the number of cases settled on appeal. However, its 1990 report provides data on the number of private, civil cases terminated pursuant to Fed. R. App. P. 42, which governs voluntary dismissals. Annual Report of the Director of the Administrative Office of the United States Courts for 1990 at 106-08, 124-26. Respondents believe it is fair to asume that most private civil appeals terminated under Fed. R. App. P. 42 are dismissed pursuant to settlement (excluding bankruptcy, prisoner, or administrative appeals and cases terminated by consolidation; these categories of cases are excluded from the totals below). For the twelve regional circuits, the total number of Fed. R. App. P. 42 cases is 2,787, or 24% of the total of 11,469. The Ninth Circuit Fed. R. App. P. 42 cases represent 508, or 31% of its total of 1,635, well above the national average.

course over another, then the benefits of having the circuits serve as laboratories on this issue will be needlessly halted.

Unocal's professed concern for efficiency is at best convenient; Unocal, after all, seeks reversal in this case so that it may try the same facts at least three times instead of once. Unocal's argument seems to be that fairness requires that it be allowed to try the same case before the same judge until it wins, even though it was Unocal's own failure to ask that judge to comply with the requirements of *Ringsby* that caused the court to apply collateral estoppel.

The only reason for this Court to intervene would be to protect a particular litigant in the event that one circuit refused to honor the decision of another to vacate a particular judgment. But petitioner merely speculates about that possibility and it is clear that it has never happened. Moreover, there is no reason to suspect that it ever will. The Rule 60(b) issue itself will not be before the second court, only the collateral estoppel issue. And that issue must be resolved, at least in a diversity case, on the basis of state law. Thus, whatever uncertainty exists, arises from the inability to know what state may be the forum for subsequent litigation or what its rule of law will be.

4. Finally, the approach to Rule 60(b) adopted in *Ringsby* and the federal law *dicta* concerning estoppel by the Ninth Circuit are both sensible and did not prejudice petitioner. Recent commentary, benefitting from the approaches of the various circuits, agrees that the Ninth Circuit approach to vacatur is appropriate. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 642 (1991) (Vacatur motions should be routinely denied, except upon showing of particular prejudice in individual case); Anstaett, Comment, *Is Settlement Conditioned on Vacatur an Option? Should It Be?*,

1991 J. Disp. Resol. 87, 106 (advocating use of Ninth Circuit balancing approach).

This case is unique. Both the district court and the Ninth Circuit concluded that Unocal took a "calculated risk" in settling *Amos* and securing vacatur without following Ninth Circuit precedent or knowing what state law of estoppel might be applied. The primary issue addressed by the district court and the Ninth Circuit was what to do in these unusual circumstances, where Unocal's calculated decision to finesse a grant of vacatur backfired. The Ninth Circuit's conclusion that Unocal bore the responsibility at least to do all that it could to increase the chances that its vacatur was effective under the circuit's own precedents does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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